STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Jerry Wilkens
d/b/a Jerrys Repair and Towing
501 N Main St
River Falls WI 54022

PECFA Claim 54022-1535-01
Hearing #96-214

Final Decision

PRELIMINARY RECITALS

Pursuant to a petition for hearing filed June 21, 1996, under §101.02(6)(e), Wis. Stats., and §ILHR 47.5.3, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, now Department of Commerce, a hearing was commenced on November 18, 1997, at Madison, Wisconsin. A Proposed Hearing Examiner Decision (Proposed Decision) was issued on May 4, 1998, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is:

> Whether the department's decision dated May 28, 1996 denying the appellant's claim for reimbursement under the Petroleum Environmental Cleanup Fund Act (PECFA) program in the amount of $20,000.00 was incorrect.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Jerry Wilkens
Jerrys Repair and Towing
501 N Main St
River Falls WI 54022

By: Edward F. Vlack III
Law Offices of Davison & Vlack
200 E Elm St
River Falls WI 54022-2308

Department of Commerce
PECFA Bureau
201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: Kristiane Randal
Department of Commerce
201 W. Washington Ave., Rm. 623
PO Box 7970
Madison WI 53707-7970

The authority to issue a final decision in this matter is made by the Acting Secretary of the Wisconsin Department of Commerce and any delegation of this authority that may have been made in this matter is revoked.

The matter now being ready for decision, I hereby issue the following

FINDINGS OF FACT

The Findings of Fact in the Proposed Decision are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Decision are hereby adopted for purposes of this Final Decision.

DISCUSSION

The Discussion in the Proposed Decision is hereby adopted for purposes of this Final Decision.

FINAL DECISION

The Proposed Decision is hereby adopted as the Final Decision of the Department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Wisconsin Department of

Commerce; Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

Send a copy of your request for a new hearing, to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing, examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing, is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes.

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: October 14, 1998

Philip Edw. Albert
Acting, Secretary
Wisconsin Department of Commerce
PO Box 7970
Madison WI 53707-7970

cc: Charles E. Brady, Esq., Law Offices of Davison & Vlack
Kelly L. Cochrane, Esq., Wisconsin Department of Commerce
Dispute Resolution Coordinator, PECFA

Date Mailed: October 15, 1998

Mailed By: Diane S. Castillon

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

MADISON HEARING OFFICE
1801 Aberg Ave., Suite A
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608)242-4818
Fax: (608)242-4813

IN **THE MATTER OF: The claim for reimbursement under the PECFA Program by**

JERRY WILKENS and
DONNA WILKENS,
d/b/a JERRY' S REPAIR & TOWING,
Appellants,

VS.

WISCONSIN DEPARTMENT OF COMMERCE,
Respondent.

Hearing Number: 96-224
Re: PECFA Claim No. 54022-1535-01

PROPOSED HEARING EXAMINER DECISION

--NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above captioned matter. *Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed.* It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Christopher C. Mohrman, Executive Assistant of the Wisconsin Department of Commerce, who is the individual designated to make the *FINAL* Decision of the Department of Commerce in this matter.

HEARING EXAMINER:
Robert C. Junceau

DATED AND MAILED:
May 4,1998

* *

MAILED TO:

Appellant's Attorneys:
Charles E. Brady, Attorney of Counsel
Law Offices of Davison & Viack
200 East Elm Street
River Falls, WI 54022

Respondent's Attorney:
Kristiane Randal, Assistant Legal Counsel
Wisconsin Department of Commerce
201 West Washington Avenue
P.O. Box 7970

Madison, WI 53707-7970

STATE OF WISCONSIN
BEFORE THE
DEPARTMENT OF COMMERCE

JERRY WILKENS and
DONNA WILKENS,
d/b/a JERRY'S REPAIR & TOWING
501 North Main Street
River Falls, WI 54022

Appellants,

vs. **Hearing No. 96-224**

WISCONSIN DEPARTMENT OF COMMERCE

PECFA CLAIM # 54022-1535-01

Respondent.

PROPOSED DECISION

This is a timely appeal by the appellants pursuant to section 101.02(6)(e), and Chapter ILHR 47.51(l) of the Wisconsin Administrative Code of a Department of Industry, Labor and Human Relations order dated May 28, 1996 denying appellants' claim for reimbursement under the Petroleum Environmental Cleanup Fund Act (PECFA) program in the amount of $20,000.

Evidentiary hearing was held on November 18, 1997 before Administrative Law Judge Robert C. Junceau of the Department of Workforce Development (formerly the Department of Industry, Labor and Human Relations), acting as a hearing examiner for the Department of Commerce which, while this matter was pending, assumed responsibility for the PECFA program. After hearing each party submitted written briefs.

The appellants appeared by Attorney Charles E. Brady, of Counsel to the Law Offices of Davison & Vlack of River Falls, Wisconsin.

The respondent appeared by Attorney Kristiane Randal, Assistant Legal Counsel for the Wisconsin Department of Commerce, Madison, Wisconsin.

Parties in interest are:

Jerry Wilkens
Donna Wilkens
d/b/a Jerry's Repair & Towing
501 North Main Street
River Falls, WI 54022

Wisconsin Department of Commerce
Environmental Regulatory Services Division
201 East Washington Avenue
P.O. Box 7969
Madison, WI 53707-7969

The issue for decision on appeal is whether the department's decision dated May 28, 1996, denying the appellant's claim for reimbursement under the Petroleum Environmental Cleanup Fund Act ("PECFA") program in the amount of $20,000.00 was incorrect.

PROPOSED FINDINGS OF FACT

1. Throughout the time material to this case, Jerry Wilkens, named as appellant herein, together with his wife, Donna Wilkens, owned real property at 501 North Main Street in River Falls, WI, where they operated a business known as "Jerry's Repair & Towing". For reasons stated below in the Proposed Opinion, they will each be regarded hereafter as appellants in this matter. The case caption as been amended, accordingly. They maintained on the premises underground storage facilities for petroleum products.

2. Neil Q. Anderson owned adjacent real property at 421 North Main Street, River Falls, WI, including a building in which he operated his own architectural design business and rented commercial and residential quarters to tenants.

3. Some time during 1992 the appellants' property was condemned by the State of Wisconsin as part of a bridge building project.

4. In 1992 Anderson brought a civil lawsuit against the appellants claiming damages in an unspecified amount by leakage of oil or gas from underground petroleum storage tanks on the appellant's property during their ownership. He claimed the appellants' tanks leaked, contaminating the soil and atmosphere of his property, thereby causing a detrimental change in his land and property, and that the offensive odors and the contamination arising from the leaks have, in the past, interfered with and still continue to interfere with and make it uncomfortable and impossible to enjoy the ordinary use of the premises and to pursue the ordinary occupations of life therein. His prayer for relief included a demand for judgment against the appellants (1) that they be perpetually enjoined from maintaining the nuisance, (2) that they pay the sum due plaintiff for the physical damage to the land, (3) that the plaintiff be granted the costs, disbursements and expenses of this action along with reasonable attorneys fees and, (4) that Anderson be granted such other and further order, judgment or relief as provided by law in such cases and as may be just and equitable.

5. The appellants had been involved with the department in remediation efforts regarding their underground petroleum storage tanks and advised the respondent of the pendency of the Anderson litigation.

6. The Anderson lawsuit was settled for $20,000 without trial. On February 3, 1993, the appellants paid Anderson an initial payment of $4,000.00 toward the settlement. The appellants paid the balance of $16,000.00, exclusive of interest, to Anderson on December 12, 1995.

7. On September 20, 1994, the appellants filed a written claim for PECFA reimbursement with the respondent in the amount of $20,000, stating it was for a third party claim funding, representing the sum paid in settlement of Anderson's lawsuit.

8. Incident to the claim, appellants provided respondent with an affidavit from Anderson, dated May 22, 1996, stating that the settlement figure of $20,000 was for the reduction in his rental income and the decrease in property value caused by the leaking underground tanks. No calculation, breakdown or other documentation of the settlement amount was included in the affidavit or otherwise provided to the department at the time.

9. On May 28, 1996 the department denied appellants' claim for PECFA reimbursement on the following grounds: "[T]he property damage costs are not actual and ... Mr. Anderson is still owner of the property and has not sold the property for a reduced value due to petroleum contamination from the Wilken's property. And it has not been documented to the Department that Mr. Anderson lost revenue due to petroleum contamination."

10. At hearing, appellants presented as evidence Anderson's testimony regarding his damages. In addition, Appellants' Exhibit 1 presented a summary of costs related to his testimony, including an estimated loss of earnings of between $14,400 to $21,600 due to his loss of ability to work on site due to fumes, a cost of $2,600 for materials and labor related to insulation and barriers to seal off the lowest level of the building to mitigate fumes, cost of additional electricity and fans totaling $1,000 for additional ventilation, $500 to $700 for labor for two men who spent two days removing contaminated materials, and personal injury value of breathing noxious fumes, $10,000 to $30,000. He did not provide any medical documentation to support his claim of personal injury. He testified to an estimated economic loss from foregone rental increases totaling $2,120 because he was unable to increase rentals for the most affected rental units in his building for four years. This superseded his loss claim in the amount of $2,256 stated in the Exhibit 1. Anderson's testimony was largely uncontroverted.

11. Anderson succeeded in reducing his property tax assessment from the City of River Falls by $32,500 based on his allegation of the effects of the leaking tanks and fumes from appellants' property. He persuaded the city assessment authority to lower the total assessed value of his real property from $96,400 in 1990 to $62,900 in 1991. Whereas the assessed value of the *land was increased* from $20,300 to $28,700, the value of the *improvements was reduced* from $76,100 to $34,200.

12. It is undisputed that the leakage and fumes affecting the Anderson property emanated solely from underground petroleum storage tanks located on the appellant's or in conjunction with the remediation efforts incident to removing those tanks.

PROPOSED CONCLUSIONS OF LAW

1. The appellants are owners or agents of a property covered by the remedial provisions of §*101.143, Wis. Stats.*

2. The department's decision denying the appellant's request for reimbursement under the PECFA program in the amount of $20,000 is incorrect because the petitioner incurred eligible reimbursable costs in the amount of $6,320 paid as compensation to a third party for property damage caused by a petroleum products discharge from the appellant's underground product storage tank system, within the meaning of section 101.143(4)(b)15 of the Wisconsin Statutes and related administrative code provisions.

3. The appellant's claim for reimbursement of costs for compensation to a third party for bodily injury was not raised in the claim filed with the department and cannot be decided by this hearing examiner.

PROPOSED DECISION

The respondent s decision dated May 28, 1996 determining the reimbursement to the appellants as a result of this PECFA claim is modified to conform with the foregoing findings and conclusions and, as modified, is reversed, in part, and remanded to the department for further proceedings consistent with this proposed decision and the proposed opinion, below.

Dated: May 4,1998

WISCONSIN DEPARTMENT OF COMMERCE

By Robert C. Junceau
Hearing Examiner

PROPOSED OPINION

Initially, although this matter is captioned in the name of Jerry Wilkens, Jerry's Repair & Towing, the claim for reimbursement was filed in the names of both Jerry and Donna Wilkens, who apparently were joint owners of the real property in question and jointly operated the repair and towing business. Therefore, they both should be considered appellants in this matter. The caption has been so amended.

The basic question in this appeal is the proper application of §101.143(4)(b)15, Stats., which provides that PECFA reimbursable costs include:

15. For an owner or operator only, *compensation to 3rd parties for bodily injury and property damage caused by a petroleum products discharge* from an underground product storage tank system. [Emphasis added].

*See, also, §§*ILHR 47.30 (1)(f) 2 and 47.36(2), *Wis. Adm. Code.*

Elsewhere, the terms "bodily injury" and "property damage" are discussed, at §101.143(l)(ad) and (gm), Stats., respectively, as follows:

> (ad) "Bodily injury" does not include those liabilities which are excluded from coverage in liability insurance policies for bodily injury other than liabilities excluded because they are caused by a petroleum product discharge from a petroleum product storage system.
>
> (gm) "Property damage" does not include those liabilities which are excluded -from coverage in liability insurance policies for property damage, other than liability for remedial action associated with petroleum product discharges from petroleum product storage systems. *"Property damage " does not include the loss of fair market value resulting from contamination.* [Italicized portion added by 1997 Wisconsin Act 27].

Section ILHR 47.36, *Wis. Adm. Code,* provides procedures for claiming costs associated with third party claims involving, among other things, compensation for damage caused by underground storage tanks. In relevant part, the section states:

> (1) GENERAL. A responsible party may file a claim with the department for the reimbursement of an amount paid to third parties for personal injury to another individual or off-site property damage associated with a petroleum product discharge from an underground petroleum product storage tank system within the scope of this chapter. The existence of these claims shall be made known to the department, by the responsible party [sic-who] shall notify the department of these claims, no later than 30 calendar days from the date that they knew or could have reasonably been expected to have known of the occurrence of the injury or personal property loss. Rules established by the office of the commissioner of insurance, as specified in s. Ins. 6.35, concerning ineligible costs for third-party claims shall apply.
>
> (2) THIRD-PARTY COMPENSATION FOR UNDERGROUND STORAGE TANKS. Costs incurred from environmental pollution and remediation actions, including compensation to third parties for property damage and individual bodily injury, may be deemed eligible costs as specified in s. ILHR 47.30 (1).
>
> (3) INTERVENTION IN THIRD-PARTY CLAIMS. The owner or operator of an underground petroleum product storage system eligible for an award under the scope of this chapter, shall notify the department in writing of any action by a third party against the owner or operator for compensation. The department may intervene in any third-party actions against an owner or operator of an underground petroleum product storage tank system for -compensation for bodily injury or property damage. The department of justice may assist the department in this intervention.
>
> (6) ELIGIBLE COSTS. (a) A responsible party may include the reimbursement for *personal injury or property damage* costs on a claim for an award within the scope of this chapter. Reimbursement of a claim shall be based on a showing that the cost was caused by the petroleum product discharge and that the amount claimed is reasonable. [Emphasis added].
>
> (b) If third-party claims exceed the maximum allowed under this chapter for the applicable type of underground petroleum product storage tank system, costs shall be reimbursed in the following order:
>
> 1. Eligible costs of on-site and off-site remediation and replacement of drinking water wells;
>
> 2. Eligible costs for personal injury; and
>
> 3. Eligible costs for property damage.

THE EVIDENCE

The appellants claim PECFA reimbursement of $20,000 paid to Anderson in settlement of his lawsuit against them. They point to the dollar value of his claims, according to his testimony, which is more than three times the settlement payment.

During remediation of their property, the appellants advised the respondent of the third party claim in the form of the pending Anderson lawsuit. It does not appear that the advisement was in writing and the date of it is uncertain, but no question was raised by respondent's personnel when informed of the lawsuit. The department took no steps to intervene in the Anderson lawsuit.

After settlement with Anderson, the appellants filed with respondent a written application form for reimbursement, together with copies of the Summons and Complaint, Answer and Settlement Agreement from the Anderson lawsuit. Later, the appellants provided a letter from the court-appointed mediator whose intervention led to the settlement, along with Anderson's deposition in his lawsuit, a letter from Anderson's attorney, and copies of the canceled checks in execution of the settlement agreement. Finally, the appellants pro-vided an affidavit from the appellants and documentation of the city assessor's assessment reduction for the Anderson parcel in question and an affidavit from Anderson.

The only document not presented to the department before its official action denying the reimbursement claim was a written summary or breakdown of Anderson's claimed losses, prepared for trial and submitted as Exhibit 1 in this case, to which Anderson testified. Exhibit 1 included the cost of insulation and barriers to seal off the lowest level of the building, the cost of ventilating the lowest level, the cost of removal of contaminated materials, and his loss of any increased rental earnings over a four year period. Exhibit 1 also claimed, the personal injury value of breathing noxious fumes and Anderson's claim of loss of professional earnings for inability to work on site.

The written settlement agreement was in the lump sum of $20,000 and made no allocation to specific elements of the complaint or demand for relief. The complaint itself did not set a dollar value on any components of the claim or an aggregate dollar value. The settlement also provided that appellants agreed to use their best efforts in order to maximize all possible funding for the ongoing clean-up costs of their former property and the property of the plaintiff.

In the lawsuit, Anderson's deposition taken by the appellants' attorney covered some of the underlying elements of Anderson's complaint, but was unspecific as to any amount of damages for property or bodily injury. In fact, the pleading did not assert "bodily injury." Anderson's 1996 affidavit to the respondent was unrevealing as to the amount of damage other than stating the reduction in the assessment for property tax purposes between 1990 and 1991. The affidavit further stated that the settlement figure was for reduction in Anderson's rental income and the decrease in property value caused by the leaking underground tanks. Anderson's written challenge to his assessment stated only a claim that his property's fair market value had been reduced by about 40%. A document shows the appellant's legal fees for defending the law suit to have been ultimately set at $1,500.

Notwithstanding the documentation filed at the hearing the appellants' third party PECFA reimbursement claim is limited to their payment of $20,000 to Anderson to settle a civil lawsuit brought by Anderson.

Based on Respondent's Exhibit 1 and Anderson's testimony, costs for remediation to his building totaled $4,300. He suffered a loss of normal annual rental increases in the amount of $2,120 over a four year period.

In addition, Anderson's property tax assessment for 1991 was reduced by $32,500 because of the contamination from the appellants' problem. The reduction on improvements on the property was greater than that amount to compensate for an assessment increase in the land value.

Anderson's claim of loss of professional earnings was an estimated $14,400 to $21,600. His claim of personal injury from breathing noxious fumes was between $10,000 and $30,000.

DISCUSSION

Section 101.143 (4)(b) 1 5 of the Wisconsin Statutes, above, provides that PECFA reimbursable costs include *"compensation* to 3-parties for *bodily injury and property damage* caused by a petroleum products discharge from an underground product storage tank system. Section ILHR 47.36(6)(a) of the Wisconsin Administrative Code, above, further provides that reimbursement for third party claims shall be based on a showing of *(1) causation* by the petroleum product discharge and (2) that the *amount claimed is reasonable.*

These are the standards applicable whether respondent is auditing the claim or a hearing examiner is proposing a decision on an appeal. The costs for personal injury and property damage are, in order, subordinate to costs of on-site and off-site remediation and replacement of drinking water well. §ILHR 47-36(6)(b). There is no contention here that the $20,000 amount of the appellants claim would, in combination with other claims, exceed the maximum allowed under the chapter.

The appellants have clearly established that they paid Anderson $20,000 in settlement of his civil lawsuit against them on a theory of the nuisance and detriment to his property created by the conditions on their property. The question is whether, for PECFA reimbursement purposes, any or all of that amount is reimbursable to the appellants. As presented at hearing, Anderson's claims fall within the following five categories: (1) remediation; (2) foregone rental increases; (3) loss in fair market value of his property; (4) loss of professional earnings; and (5) personal or bodily injury.

Categories (1) through (3) are in the nature of a property damage claim. In contrast, categories (4) and (5) are more in the nature of personal or bodily injury claims.

The appellant presented in its reimbursement claim only a claim for third party property damage. No claim for bodily or personal injury was made or subject to audit. Accordingly, the hearing examiner will consider only the property damage reimbursement items, (1) through (3), and not those relating to personal or bodily injury.

Section 101.143(4)(d)15 does not specifically define "compensation," so that settlement of a lawsuit is not clearly included or excluded. However, in common parlance, a sum of money paid to a third party in settlement of a lawsuit can reasonably be regarded as "compensation," whether for bodily injury or property damage, under appropriate circumstances.

The rental income loss to Anderson was fixed at $2,120 by his testimony at hearing. It is reasonable to conclude that a foregone increase in rental income due to the effects of contamination from the appellants' property or remediation constitutes "property damage". Although evidence of costs to remediate the situation in the building were not presented during audit, they were satisfactorily proven at the hearing, under oath and cross-examination, to have been $4,300.

Prior to the 1997 effective date of the amendment to § 101.143 (1) (gm), a *loss in fair market value* resulting from contamination was not excluded from the term "property damage". Therefore, for purposes appellant's claim and this appeal , the amendment is ineffectual. However, a loss of fair market value is not satisfactorily established merely by the showing of a reduction in a property tax assessment. Unless a property is actually sold at a loss in a fair sale, or the loss is otherwise quantified by a competent valuation expert such as by a property appraisal, the amount of loss, if any, is not established. A loss in property value was not established by the evidence. The four years of rental increases foregone and the remediation costs to the property are the only satisfactorily proven losses due to property damage. Conceptually, the measure of loss in fair market value of income producing property would be primarily rental income lost due to the contamination and the cost to cure the effects of the contamination.

Therefore, although a showing of loss of fair market value would fall within the category of "property damage" for the period in question, the evidence as presented cannot be deemed competent evidence of "property damage".

To the extent the examiner is permitted to consider the appellant's evidence, it establishes $6,420 in property damage, including lost rental income and remediation costs incurred by the appellants.

There was no claim of bodily injury before the department at the time of its decision. This examiner concludes that he cannot entertain such claim now. Although, so far as he is aware, there are no specific statutes or rules or case law on the matter, and none has been cited as authority to him, it seems that a claim not raised in the audit procedure ought not be decided on appeal. However, this does not preclude the appellants from making such claim to the department. This examiner is considering such claim to have been made at hearing and, therefore, a remand to the respondent for further audit is appropriate.

Therefore, the respondent's denial of the appellants' claim for reimbursement of $20,000 is reversed in part to allow for a $6,420 reimbursement to the appellants for compensation to a third party for property damage.

This matter is further remanded to the department for additional audit and decision, limited to the issue of whether appellants are eligible for reimbursement not exceeding $13,580 for compensation paid to a third party for bodily or personal injury.